

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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RICHARD TURNER,

OPINION and ORDER

Petitioner,

11-cv-50-bbc

v.

JEFFREY PUGH, Warden,  
Stanley Correctional Institution,

Respondent.  
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Richard Turner's petition for a writ of habeas corpus under 28 U.S.C. § 2254 is before the court for a decision on its merits. In his petition, petitioner challenges the sentence he received for his July 27, 2007 conviction in the Circuit Court for Rusk County for second-degree sexual assault to a child under the age of 16. Specifically, he contends that the judge relied on inaccurate information when determining his sentence.

After reviewing the petition on its merits, I conclude that petitioner's claim lacks merit because the state court of appeals' conclusion that petitioner was sentenced on accurate information was reasonable. Although the sentencing judge made references to inaccurate information during petitioner's sentencing, the information was not material and the judge did not rely on it in determining petitioner's sentence. Accordingly, I will deny the

petition.

From the state court opinions and documents attached to the parties' submissions, I find the following facts.

### RECORD FACTS

Petitioner was charged in 2006 in Rusk County case no. 2006CF63 with two counts of second-degree sexual assault of a child under the age of 16, three counts of soliciting the sexual assault of a child under the age of 16 and one count of felony bail jumping. The complaint alleged that petitioner, a 29 year old man, had sexual intercourse with a 15-year old girl. The complaint also alleged that petitioner encouraged the girl to consume alcohol and to have sex with his friends, which she did. At the preliminary hearing, the victim testified that petitioner had sexual intercourse with her twice, on August 11 and 12, 2006. She also testified that on August 16, she was with petitioner and four of his male friends near a woods in the City of Ladysmith. She testified that she had sexual intercourse with three of petitioner's friends in the woods and a fourth later at his house. She stated that she had sex with petitioner's friends because petitioner asked her to and threatened to leave if she did not. Dkt. #6-9 at 7. One of petitioner's friends testified that he had sexual intercourse with the victim in the woods and that, beforehand, petitioner encouraged him to "[t]ake her in the woods and try her out." Id. at 17.

Pursuant to a plea agreement, petitioner pleaded guilty to count 1 of an information, which alleged that petitioner had sexual intercourse with the victim on August 11, 2006. The state dismissed the remaining counts.

During the sentencing hearing, the judge asked petitioner whether he admitted pimping the victim to his friends. Petitioner denied it and admitted only that he had sex with the victim. Later in the proceeding, the judge said

The facts that [petitioner] admitted to when I took his plea was that he pimped her with his buddies at a beer party. She talked about that in the first and second letter than she sent to me. And he admitted to those facts. He denies those facts today.

Dkt. #6-10 at 28-29. The judge also stated that petitioner had provided the victim alcohol and drugs and characterized petitioner's frame of mind as follows:

[W]hat you did . . . was: This is going to be an easy mark. I can control her. I can make her do what I want. I can pimp her. And you did.

Id. at 31. At the sentencing hearing, the victim's parents made statements suggesting that plaintiff contracted herpes as a result of petitioner's conduct. The judge responded that he did not know "where [the herpes] came from" but that it was "not relevant" because "[w]hether [petitioner] caused it or not, [he] participated in some pretty serious behavior with a 15-year old girl." Id. The judge also noted that

The victim is suicidal. She went from . . . an A student to an F student. There has been significant trauma to the child and to her family. And, indeed, the trauma will continue through many years, probably through many thousands of dollars of evaluation and treatment. There is significant impact here.

Id. at 32. The judge sentenced petitioner to 15 years of initial confinement to be followed by ten years of extended supervision.

Petitioner appealed the judge's sentencing decision, contending that the sentencing judge had relied on the false statement that petitioner had admitted "pimping" the victim to his friends at a beer party, when in fact, petitioner had never admitted to pimping the victim. In addition, he contended that the judge relied on the false information that petitioner gave the victim herpes, even though petitioner does not have herpes. The court of appeals denied the appeal, holding that the judge's findings and sentence were supported by the evidence in the record. State v. Turner, 2009 WL 1457981 (Wis. App. 2009).

Petitioner petitioned for review by the state supreme court, but that court denied his petition on November 2, 2009. He filed this petition for a writ of habeas corpus on January 1, 2011.

## OPINION

The only issue that petitioner is raising is the sentencing judge's alleged reliance on false information to increase his sentence. He contends that the judge relied on information that (1) petitioner admitted "pimping" the victim to his friends; (2) petitioner gave the victim drugs; and (3) the victim contracted herpes from petitioner.

To prevail on his due process claim in this habeas corpus proceeding, petitioner must

show that the Wisconsin courts' rejection of his due process claim was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "[T]his standard is difficult to meet," and requires state prisoners to "show that the state court's ruling on the claim being presented was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 131 S. Ct. 770, 786-87 (2011).

Petitioner is correct that all criminal defendants have a due process right to be sentenced on the basis of accurate information. Promotor v. Pollard, 628 F.3d 878, 888 (7th Cir. 2010) (citing United States v. Tucker, 404 U.S. 443, 447 (1972) and Townsend v. Burke, 334 U.S. 736, 741 (1948)). However, not all inaccuracies deprive a defendant of due process; the incorrect information must be "materially untrue." Promotor, 628 F.3d at 888 (quoting Townsend, 334 U.S. at 741). Additionally, a defendant who requests resentencing must establish that the sentencing court "relied on the critical inaccurate information when announcing its sentence." Id. (citing Simonson v. Hepp, 549 F.3d 1101, 1107 (7th Cir. 2008)). A sentencing court "relies" on misinformation by "giv[ing] explicit attention to it, found[ing] its sentence at least in part on it, or giv[ing] specific consideration to the

misinformation before imposing sentence.” Id. (citation and quotations omitted).

In this case, petitioner would be entitled to a resentencing hearing if he could show that the state circuit court judge had sentenced him on the basis of materially incorrect information about petitioner’s admission of “pimping” the victim, providing her drugs and giving her herpes. However, petitioner does not meet that standard because, as the Wisconsin Court of Appeals noted, the sentencing judge did not rely on inaccurate information when sentencing petitioner.

With respect to the “pimping” allegations, the court of appeals found that the trial court “sentenced [petitioner] based on its findings that [petitioner] pimped [the victim], not any admission by [petitioner].” Turner, 2009 WL 1457981, \*2. This was not an unreasonable conclusion because the record contained testimony from both the victim and one of petitioner’s friends that petitioner successfully encouraged his friends to have sexual intercourse with the victim. The sentencing judge acknowledged that petitioner denied “pimping” the victim, but concluded that the evidence supported such a finding anyway. (From the context, it appears that the state circuit court judge used the term “pimping” to describe petitioner’s success in persuading the victim and his friends to have sexual intercourse. There is no suggestion that money was exchanged between the parties involved or that the judge was referring to a specific offense of “pimping.”)

In response to petitioner’s argument that the sentencing judge relied on the false

allegation that the victim contracted herpes from petitioner, the court of appeals stated that the sentencing judge “ma[de] no finding about whether [the victim] contracted herpes as a result of [petitioner’s] conduct.” Id. at \*3. Rather, the judge sentenced petitioner on the basis of other information in the record regarding the harm petitioner caused the victim. This conclusion by the court of appeals was not unreasonable, particularly because the sentencing judge stated that it was irrelevant whether petitioner gave the victim herpes. Instead, the sentencing judge noted, the evidence showed that petitioner had caused serious trauma to the victim and her family.

Finally, it was reasonable for the court of appeals’ to conclude that the circuit court judge did not rely on his misstatement that petitioner provided drugs to the victim in determining petitioner’s sentence. Id. Although the sentencing judge mentioned drugs once during sentencing, he noted that he had considered several facts in determining petitioner’s sentence, including the age disparity between petitioner and the victim, the advantage petitioner took of the victim, his encouraging his friends to do so and the impact of petitioner’s behavior on the victim, as reflected in her letters to the court and her parents’ statements. The sentencing judge’s single reference to petitioner’s having provided drugs to the victim was not “misinformation of a constitutional magnitude” requiring resentencing.

In sum, the court of appeals’ adjudication was appropriate, was not contrary to Supreme Court authority, did not involve an unreasonable application of federal law and was

not based upon an unreasonable determination of the facts.

The only question remaining is whether to grant a certificate of appealability to petitioner. Under Rule 11 of the Rules Governing Section 2254 Cases, I must issue or deny a certificate of appealability when entering a final order adverse to petitioner. To obtain a certificate of appealability, the applicant must make a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not close. No reasonable jurists would conclude that the state circuit court judge relied on inaccurate information of a “constitutional magnitude” when sentencing petitioner in violation of petitioner’s right to due process. Thus, petitioner has failed to make a substantial showing of the denial of a constitutional right.

#### ORDER

IT IS ORDERED that the petition of Richard Turner for a writ of habeas corpus



under 28 U.S.C. § 2254 is DENIED and petitioner is DENIED a certificate of appealability.

Petitioner may seek a certificate from the court of appeals under Fed. R. App. P. 22.

Entered this 29th day of June, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge